Nos. 87-578 and 87-602

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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THE BANK OF NOVA SCOTIA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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WILLIAM A. KILPATRICK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a district court has authority to dismiss an indictment for alleged grand jury abuse in the absence of prejudice.

2. Whether a district court's holding that the independent judgment of the grand jury has been infringed is subject to de novo review.

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# In the Supreme Court of the United States

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No. 87-578

THE BANK OF NOVA SCOTIA, PETITIONER

*v.*

UNITED STATES OF AMERICA

No. 87-602

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41)[1] is reported at 821 F.2d 1456. The opinions of the district court (Pet. App. C1-C55, D1-D35) are reported at 594 F. Supp. 1324 and 575 F. Supp. 325.

## JURISDICTION

The judgment of the court of appeals was entered on June 18, 1987. Petitions for rehearing were denied on August 19, 1987 (Pet. App. B1-B3). The petition for a writ

[1] "Pet. App." refers to the appendix to the petition in No. 87-578.

of certiorari in No. 87-578 was filed on October 9, 1987, and the petition in No. 87-602 was filed on October 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case stems from a 20-month investigation conducted by two successive grand juries. Two attorneys from the Tax Division of the Department of Justice assisted the grand juries in the investigation. The attorneys, in turn, were assisted by numerous personnel from the Internal Revenue Service. In September 1982, a 27-count indictment was returned charging petitioners and others (in various combinations) with conspiracy, in violation of 18 U.S.C. 371; willfully aiding and assisting in the preparation and presentation of false tax returns, in violation of 26 U.S.C. 7206(2); willfully making and subscribing false individual tax returns (Forms 1040), in violation of 26 U.S.C. 7206(1); mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503.

The district court initially dismissed all but one of the counts for failure to state an offense. Petitioner Kilpatrick went to trial and was convicted on the one remaining count (obstruction of justice). The government appealed the dismissal of the other 26 counts. Before argument, the court of appeals granted a defense motion and partially remanded the case to the district court for the purpose of determining whether prosecutorial misconduct during the grand jury proceedings constituted another basis for dismissal. On remand, the district judge granted a new trial to petitioner Kilpatrick and ordered the disclosure of the grand jury transcripts. Because he was retiring from the bench, however, that district judge did not decide whether the indictment should be dismissed for pros-



ecutorial misconduct; instead, the cases were reassigned to another district judge. Pet. App. A2 & n.2, D26-D33.

The newly assigned judge, after conducting a 10-day hearing, dismissed all 27 counts of the indictment because of prosecutorial misconduct (Pet. App. A2, C54-C55). The court held that Fed. R. Crim. P. 6(e) was violated by the disclosure of grand jury material to IRS civil employees (Pet. App. C37-C40), by the failure of the government to provide prompt notice to the court of disclosures of grand jury material (*id.* at C38), by the disclosure to various potential witnesses of the names of targets of the investigation (*id.* at C40-C41), and by the prosecutors' instructions to two witnesses that they were not to reveal the fact that they had testified before the grand jury or the substance of their testimony (*id.* at C41). In addition, the court held that Fed. R. Crim. P. 6(d) was violated because IRS agents made joint appearances before the grand jury for the purpose of reading transcripts to the jurors (Pet. App. C7-C8, C35-C36).

The court also found that the prosecution engaged in misconduct by arguing with an expert witness, during a grand jury recess but within the hearing of some grand jurors, after the witness had given testimony favorable to the defense (Pet. App. C33-C34). Furthermore, the court held that the government violated the witness immunity statute (18 U.S.C. 6002, 6003) by the use of "pocket immunity" or "letters of assurance" (Pet. App. C44-C46). Moreover, it found that the government presented "questionable hearsay" to the grand jury (*id.* at C47), that it violated the Fifth Amendment because it called several witnesses for the sole purpose of having them assert their Fifth Amendment privilege (*id.* at C46-C47), and that it violated the Sixth Amendment by conducting post-indictment interviews of several high-level employees of the Bank of Nova Scotia without notifying counsel for the bank (*id.* at C47-C49). The court also found that the in-

dependence of the grand jury was compromised because IRS agents were sworn as "agent[s] of the grand jury" (*id.* at C3-C8).

The district court held that the indictment should be dismissed because of the Rule 6(d) and 6(e) violations and because of the "totality of the circumstances" underlying the indictment (Pet. App. C54-C55). The court found that the conduct of the government was prejudicial to the defendants because the grand jury "was converted into little more that a rubber stamp" (*id.* at C53-C54). In addition, it found that, wholly apart from any prejudice, dismissal was appropriate as an exercise of the court's "supervisory authority" (*id.* at C53).

2. The court of appeals reversed and remanded the case with directions to reinstate all the counts of the indictment (Pet. App. A1-A33). After first concluding that the indictment was legally sufficient (*id.* at A3-A11), the court addressed the standard of review to be applied to the trial court's findings. It indicated that the issue whether the government had engaged in specific acts of misconduct "involves questions of historical fact governed by the clearly erroneous standard" (*id.* at A15 (citations omitted)). It further concluded, however, that the issue "whether the independent judgment of the grand jury has been infringed" was one "involv[ing] the consideration of legal principles, calling for *de novo* review by the appellate court" (*id.* at A16). Applying that standard, the court held that dismissal of the indictment was inappropriate (*id.* at A29). The court further held that dismissal would be inappropriate even under the clearly erroneous standard urged by petitioners (*ibid.*; see *id.* at A15).

In reaching its decision, the court reviewed in detail the various grand jury violations found by the district court. It stated that, based on its review of the record, it was "not persuaded by the several reasons given for the dismissal" (Pet. App. A21). Thus, the court noted that the use of summaries of evidence is "permissible and often helpful,



especially in complicated cases such as this" (*ibid.*); it stated that the use of "informal immunity" was "entirely proper" and that, in any event, "the defendants have failed to show how the use of informal immunity prejudiced the grand jury" (*id.* at A22 (footnote and citation omitted)); and it held that the government's post-indictment questioning of bank employees "could not possibly have affected the grand jury's charging decision" (*ibid.*). The court also held that the presence of more than one IRS agent in the grand jury for the purpose of reading transcripts, while it violated Rule 6(d), did not warrant dismissal of the indictment because of the absence of prejudice from the violation (Pet. App. A22-A23).[2]

In addition, the court of appeals found no support for the district court's findings that government attorneys " 'relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made' " (Pet. App. A23 (quoting district court opinion)) or that IRS agents "manipulated the grand jury" in order to obtain materials for use in civil litigation (*ibid.*). The court also noted that, "[a]ssuming that [the] allegation" of improper disclosure of grand jury materials to civil IRS agents "finds support in the record," the grand jury's independence was not "usurped in such a significant way as to amount to grand jury abuse" (*id.* at A24). In addition, the court noted that "[t]he aid of IRS experts was essential to a complete understanding of the case" and that "[t]he fact that some of the IRS personnel assigned to the grand jury investigation were from the civil division is by itself not sufficient to show grand jury abuse" (*ibid.*). The court cited the grand jury's return of a multi-count indictment as

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[2] The court noted the district court's finding that IRS agents had convened grand jury sessions without government attorneys being present, but it held that the finding was "not supported by the record" (Pet. App. A23 n.14).

"probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A25 (footnote omitted)).

The court also held that the grand jury's independent judgment was not infringed by the fact that the identity of some of the targets of the investigation was disclosed to potential witnesses or that two witnesses were directed not to reveal the contents of their testimony (Pet. App. A25).[3] Regarding the term "agent of the grand jury" that was used in reference to certain IRS agents who were assisting in the investigation, the court—without deciding whether the use of that designation was improper—found that there was no showing of prejudice (*id.* at A25-A26). Similarly, the court found no basis for dismissal of the indictment based on the fact that several witnesses who intended to invoke the Fifth Amendment were called before the grand jury. The court noted that such an intention by witnesses "cannot be transformed into a prohibition against inquiry" and that "[o]nce the privilege was invoked on the record, the prosecutors discontinued all questioning." *Id.* at A26-A27 (footnote omitted). And the court found that the mistreatment of an expert witness during a grand jury recess, while not proper conduct, did not jeopardize the grand jury's independence (*id.* at A27).

The court noted that a "presumption of regularity * * * attaches to grand jury proceedings" (Pet. App. A27), and it found that petitioners had failed to overcome that presumption. The court observed that the grand jury transcripts reflect "an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys" (*id.* at A27 & n.20 (citing numerous examples)). In addition, the court pointed out that, as reflected in the grand jury transcripts, "the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it" (*id.* at A27 n.20 (quoting examples)). The court noted that "[t]he district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury" (*id.* at A27-A28).

Finally, the court held that the "drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories," could not be exercised in the absence of "a significant infringement on the grand jury's ability to exercise independent judgment" (Pet. App. A32 (footnote omitted)).

Judge Seymour dissented (Pet. App. A34-A41). In her view, a showing of prejudice to the defense is not required in order for a court to dismiss an indictment on the basis of its supervisory powers (*id.* at A34-A40). She believed that in the present case, "the district court was within its discretion in exercising its supervisory power to protect the integrity of the judicial process and to deter illegal conduct" (*id.* at A40-A41).

## ARGUMENT

1. a. Petitioners' principal argument is that the court of appeals erred in holding that the district court could not dismiss the indictment in the absence of prejudice (87-578 Pet. 9-17; 87-602 Pet. 13-17). The court's holding, however, is entirely consistent with this Court's decisions in *United States* v. *Morrison*, 449 U.S. 361 (1981); *United States* v. *Hasting*, 461 U.S. 499 (1983); and *United States* v. *Mechanik*, 475 U.S. 66 (1986). In *Morrison*, the court

[3] Rule 6(e)(2), Fed. R. Crim. P., has been construed to mean that witnesses are not bound by the obligation of secrecy imposed on other participants in the grand jury proceeding. See *In re Application of Eisenberg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *Bast* v. *United States*, 542 F.2d 893, 896 (4th Cir. 1976).

of appeals had reversed the defendant's conviction and dismissed the indictment, without any showing of prejudice, because her Sixth Amendment right to counsel had been violated by the efforts of government agents to disparage her attorney's representation. This Court unanimously reversed, holding that since the violation had no impact on the criminal proceedings, the remedy fashioned by the court of appeals was inappropriate (449 U.S. at 367). The Court stated (*id.* at 365 (footnote omitted)) that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." The Court further noted (*ibid.*) that the requirement of prejudice applies not only in the Sixth Amendment context but also in the Fourth and Fifth Amendment contexts as well.[4]

In *Hasting*, the Court ruled that a court may not use its supervisory powers to reverse a conviction based on a prosecutor's improper comment on the defendant's failure to testify, without first determining if the alleged error is harmless. The Court noted (461 U.S. at 506) that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." And in

[4] The dissent below errs in stating that the Court in *Morrison* indicated that "a showing of prejudice is not required when the record reveals 'a pattern of recurring violations' " (Pet. App. A40 (quoting 449 U.S. at 366 n.2)). In fact, the Court left the issue open; it simply noted that "the record before us does not reveal a pattern of recurring violations by investigative officers that *might* warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.* (emphasis added)). In any event, the record in this case does not show that the actions found by the court of appeals to be improper represent anything but isolated occurrences confined to this single case (see generally Pet. App. D2, D10).



*Mechanik*, the Court reversed the court of appeals' holding that a violation of Fed. R. Crim. P. 6(d) required automatic reversal of a subsequent conviction even in the absence of prejudice. The Court reasoned that the subsequent conviction rendered harmless any violation of Rule 6(d). In reaching its decision, the Court stated (475 U.S. at 71-72 (citations omitted)) that "Federal Rule of Criminal Procedure 52(a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to 'errors, defects, irregularities or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself."[5]

Thus, this Court's decisions suggest that a district court may not avoid the requirement of measuring the prejudicial effect of prosecutorial misconduct simply by employing its supervisory powers to dismiss an indictment, even where those powers are used for the salutary purpose of "disciplin[ing] the prosecutors of its jurisdiction" (*Hasting*, 461 U.S. at 505).

The Bank of Nova Scotia nonetheless contends (87-578 Pet. 13-16) that under *Hasting* and its progeny, a court may dismiss an indictment for harmless error where the in-

[5] The Bank of Nova Scotia errs in suggesting (87-578 Pet. 9-10) that the Court in *Mechanik* left open the question whether dismissal of an indictment prior to trial is proper in the absence of prejudice. In fact, the Court appears to have assumed that a showing of prejudice is required. Thus, early in its opinion, the Court "assume[d] for the sake of argument" that the violation of Rule 6(d) would have permitted the district court to dismiss portions of the indictment "*had there been actual prejudice* and had the matter been called to its attention before the commencement of the trial" (475 U.S. at 69-70 (emphasis added)). At the end of its opinion, the Court stated that it was "express[ing] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial" (475 U.S. at 72 (emphasis added; footnote omitted)).

terests underlying the supervisory power of courts outweigh the interests protected by the harmless error doctrine. However, while this Court has dispensed with harmless error analysis as to some types of errors, these situations are plainly the exceptions rather than the rule. See *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 8. Recent decisions of this Court make clear that courts must apply the harmless error doctrine where an error, even a constitutional one, is susceptible to meaningful harmless error analysis, does not necessarily render the factfinding process fundamentally unfair, and does not involve a right protecting fundamental values unrelated to the factfinding process. See *Rose*, slip op. 6-8; *Young* v. *United States ex rel. Vuitton ET Fils., S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion) (appointment of interested prosecutor raised doubt that prosecution could be conducted in a disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to a ready assessment of its effects on the prosecution); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm).

The conduct at issue here falls within the general rule requiring a harmless error evaluation. None of the conduct alleged in this case rendered the grand jury's factfinding process so unfair that prejudice must be presumed.[6] More-

[6] Indeed, many of the actions at issue were found by the court of appeals to be entirely proper. For example, the court found nothing improper in the use of summaries of evidence or the granting of informal immunity (Pet. App. A21-A22). It also suggested that the government's calling of witnesses who asserted their Fifth Amendment privilege was permissible, since the prosecutors ceased questioning the witnesses after the privilege was invoked (*id.* at A26-A27). Similarly, the court stated that the use of IRS personnel from the civil division to assist in the investigation was "not sufficient to show grand jury abuse" and that "the fact that the grand jury returned an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A24-A25 (footnote omitted)). See also Gov't C.A. Br. 7-38 (explaining that many of the alleged violations cited by the district court were either not violations at all or were at most technical violations of Rule 6(d) that did not compromise the grand jury's independence).



over, the conduct in question consisted of discrete acts whose nature was readily ascertainable from grand jury transcripts and testimony at the hearings in the district court. Thus, any improper conduct could be evaluated under a harmless error analysis with a view to determining whether it likely had an unfair impact on the grand jury's charging decision. Finally, unlike conduct such as racial discrimination in the selection of grand jurors, the conduct at issue here does not " 'strike[] at the fundamental values of our judicial system and our society as a whole' " (*Vasquez*, 474 U.S. at 262 (citation omitted)). Thus, the court of appeals' holding that dismissal of the indictment was not warranted in the absence of prejudice to the petitioners is fully consistent with—if not compelled by—various decisions of this Court.

b. Petitioners concede that the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all require a showing of prejudice before an indictment may be dismissed (87-578 Pet. 12 (citing cases); 87-602 Pet. 17 (citing cases)). They contend (87-578 Pet. 12; 87-602 Pet. 16-17), however, that the present case conflicts with decisions of the Second, Third, and District of Columbia Circuits. That claim lacks merit.

The Third Circuit, citing *Hasting*, has recently taken the position that an indictment may not be dismissed for grand jury abuse in the absence of prejudice. *United States* v. *Martino*, 825 F.2d 754, 759-760 (1987). The court noted that, notwithstanding some of the language used in earlier Third Circuit cases, it in fact has "looked to prejudice" in "every case" (*id.* at 759). Thus, the Third Circuit's ap-

proach is now consistent with that of the court below.[7] Similarly, we know of no case in which the District of Columbia Circuit has dismissed an indictment for grand jury abuse in the absence of prejudice.[8] And while the Second Circuit, in a case decided over a decade ago, dismissed an indictment where there was no showing of prejudice, (*United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972)),[9] petitioners have cited no case decided since *Hasting*—and we have found none—in which the Second Circuit has

[7] Although both the majority and the dissent below indicated that the Third Circuit took a different position on the need for a showing of prejudice, the decision in this case was rendered prior to *Martino*, and both opinions cite only pre-*Martino* Third Circuit cases for the view that prejudice is not required (Pet. App. A32 n.22, A39-A40). In *United States* v. *Holloway*, 778 F.2d 653, 658-659 (11th Cir. 1985) (cited by the dissent at Pet. App. A39-A40), cert. denied, 476 U.S. 458 (1986), the court noted a conflict among the circuits; however, like the majority and the dissent below, it cited only older Third Circuit authority as holding that prejudice is not required. The Court in *Holloway* did not endorse either approach, but a recent Eleventh Circuit case has held that prejudice *is* required. See *United States* v. *O'Keefe*, 825 F.2d 314, 318 (1987).

[8] The Bank of Nova Scotia cites only one District of Columbia Circuit case, *United States* v. *McCord*, 509 F.2d 334 (1974), cert. denied, 421 U.S. 930 (1975) (87-578 Pet. 12). That case, however, was decided prior to this Court's decisions in *Mechanik*, *Hasting*, and *Morrison*. Indeed, in *Morrison*, this Court suggested that the language in *McCord* that the Bank of Nova Scotia relies upon is not good law. See 449 U.S. at 367 n.4. Moreover, the court in *McCord* recognized that while prejudice was not a strict prerequisite, it was "relevant to [its] determination" (509 F.2d at 350), and the court held that dismissal of the indictment in that case was *not* appropriate because the defendant was not prejudiced (*id.* at 350-351).

[9] See also *United States* v. *Jacobs*, 531 F.2d 87, 90 (2d Cir.) (affirming dismissal of a count of an indictment without requiring prejudice), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976) (reinstating dismissal), cert. dismissed, 436 U.S. 31 (1978).



dismissed an indictment in the absence of prejudice.[10] Thus, it is not clear whether either the Second Circuit or the District of Columbia Circuit would today dismiss an indictment for prosecutorial misconduct before the grand jury without first finding prejudice. In sum, all but two of the circuits that have considered the issue have explicitly ruled that prejudice is required before dismissal of an indictment is appropriate, and the state of the law in the other two circuits is not clear. There is therefore no present conflict among the circuits on this issue, and in light of recent decisions of this Court, it appears that the courts of appeals are moving in the direction of a uniform rule requiring a showing of prejudice as a prerequisite to dismissal. Review by this Court is therefore unwarranted.

2. Petitioners also assert (87-578 Pet. 17-22; 87-602 Pet. 17-23) that the court of appeals applied the wrong standard of review in assessing the claim of grand jury abuse. That issue likewise does not warrant review by this Court.

The court of appeals noted that the question whether the prosecutors engaged in misconduct before the grand jury "involves questions of historical fact governed by the

[10] In a recent post-*Hasting* case, *United States* v. *Hogan*, 712 F.2d 757 (1983), the Second Circuit dismissed an indictment for grand jury abuse. However, the court specifically distinguished *Hasting* in part because, unlike in *Hasting*, the misconduct was prejudicial, not harmless (see 712 F.2d at 762 n.2). In another recent case, the Second Circuit suggested in dictum that an indictment could be dismissed in the absence of prejudice, but it refused to do so under the facts presented. *United States* v. *Bari*, 750 F.2d 1169, 1176 (1984), cert. denied, 472 U.S. 1019 (1985). The court noted that dismissal of an indictment was an "extreme remedy" (*id.* at 1177). See also *United States* v. *Dyman*, 739 F.2d 762, 768 (2d Cir. 1984) (stating that dismissal of an indictment is justified to eliminate prejudice or pursuant to a court's supervisory powers, but refusing to dismiss indictment under the facts presented), cert. denied, 469 U.S 1193 (1985).

clearly erroneous standard" (Pet. App. A15). In this case, however, the court noted that the facts were essentially undisputed, and that the issue was whether those facts satisfied the legal standard governing the dismissal of indictments because of grand jury misconduct (*id.* at A16). Therefore, the court held, the question of the propriety of the dismissal in this case involves principally "the consideration of legal principles, calling for *de novo* review by the appellate court" (*ibid.*). In particular, the court explained, the question of prejudice—whether the prosecutors' misconduct tainted the grand jury proceedings—was subject to de novo review, rather than review under the clearly erroneous test (*ibid.*). Under that standard, the court of appeals determined that the district court erred in concluding that the indictment was tainted and the grand jury's function usurped by prosecutorial misconduct (*id.* at A29). The court added, however, that even if those determinations were regarded as findings of fact, the court would find them clearly erroneous on the record in this case (*ibid.*).

The court of appeals was correct in ruling that the issue of prejudice is a question of law that is subject to de novo review. Petitioners do not suggest that there is any conflict among the circuits on this issue, and in fact there is none. To the extent that the issue has been raised at all, it has been held that the issue of prejudice is a mixed question of fact and law that is subject to de novo review by the appellate court. See *United States* v. *De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986), cert. denied, 477 U.S. 908 (1986). As the court of appeals explained in *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 n.9 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984), de novo review is appropriate on this issue because "[w]e are not here engaging in a traditional factfinding function, but are making a value judgment from written grand jury transcripts whether the prosecutor's misconduct so biased the grand



jury that dismissal of the indictment is warranted." The determination whether particular conduct is prejudicial has been held to present mixed questions of fact and law, and thus to be subject to de novo review in other contexts as well. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (prejudice prong of inquiry into ineffective assistance of counsel); *United States* v. *Lehman*, 792 F.2d 899, 901 (9th Cir. 1986) (inquiry into prejudice from failure to disclose exculpatory information at trial), cert. denied, No. 86-5331 (Oct. 6, 1986).[11]

In any event, as the court of appeals made clear, the outcome of this case did not turn on the standard of review. Although the court below held that it was appropriate to review de novo the district court's conclusion that the grand jury process had been tainted by the prosecutors' misconduct, the court stated that if the "clearly erroneous" test was applicable, the district court's conclusion was clearly erroneous and would therefore be reversed even under that standard (Pet. App. A29). Thus,

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[11] The cases from this Court on which petitioners rely are not enlightening on the issue presented here. Petitioners argue that the clearly erroneous test should apply, because the district court's rulings were based on live testimony. But the issue on which the court of appeals exercised de novo review—the issue of prejudice or taint—was not based on live testimony at all. Cases such as *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), and *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), involved questions of intent or other state of mind, which constituted questions of fact. The issue of prejudice or taint, on the other hand, requires the court to assess the probable legal impact of a particular error on a body from whom neither the district court nor the appellate court has heard. That issue is therefore properly characterized as a mixed question of fact and law and is subject to de novo review. *Maine* v. *Taylor*, 477 U.S. 131 (1986), which involved the question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish, is not even remotely similar to this case.

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the court of appeals examined the issues in this case under the standard of review advocated by petitioners (see *id.* at A15), and concluded that even under that standard petitioners would not be entitled to relief. Review by this Court on the issue of the standard of review would therefore serve no purpose.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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